

DECISION

Wershof
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548
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FILE: B-211280**DATE:** November 18, 1983**MATTER OF:** Commercial Window & Door Co., Inc.**DIGEST:**

IFB requirement for the submission of test results concerning the performance of windows relates to the bidder's responsibility, which may be determined on the basis of information submitted after bid opening, rather than bid responsiveness where the information apparently is not needed to determine conformance with the specifications and the IFB does not clearly advise bidders that the submission requirement involves responsiveness and of the consequences of not furnishing the data with their bids.

Commercial Window and Door Co., Inc. protests the Army's rejection of its bid to supply the Army's requirements for replacement windows at Fort George G. Meade, Maryland. The Army determined the bid to be nonresponsive for failure to include certain test data concerning window performance that the invitation (No. DAKF27-83-B-0020) stated bidders must submit with their bids. The protester contends that the requirement to submit the test data had been waived by the Army in the two previous procurements, and argues that the failure to furnish it should not have affected the responsiveness of the bid.

We sustain the protest.

The solicitation's specifications gave a precise description of the required windows and included a paragraph captioned "Performance Requirements," stating:

"General: All bidders shall submit test data from an accepted testing laboratory and shall meet or exceed the following, together with bid at the time of bid opening."

The solicitation then detailed certain tests to determine whether the windows would withstand, within certain tolerances, exposure to wind, water, and heavy loads.

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The Army based its rejection of the bid on a determination that the data requirement related to the bid's responsiveness, which entails a determination of whether the offered items conform to the government's needs as stated in the solicitation. Western Waterproofing Company, Inc., B-183155, May 20, 1975, 75-1 CPD 306.

Generally, a preaward testing requirement merely serves to verify the bidder's ability to provide the required items in conformance with the specifications. Since capability involves a bidder's responsibility, the test data usually can be furnished after bid opening, as is the case with any responsibility-related material. See Cecile Industries, Inc., B-194273, April 23, 1979, 79-1 CPD 282.

Where, however, the data is needed to determine whether the offered items themselves conform to the solicitation's specifications, the agency may require the data to be furnished with the bid, as a matter of bid responsiveness. Western Waterproofing Company, Inc., supra. In that case, the data should be treated as descriptive information under Defense Acquisition Regulation § 2-202.5 (1976 ed.), and the solicitation should contain a clear statement of the purpose for which the technical data is required, the extent to which it will be considered in the evaluation of the bid, and the consequences of not furnishing the data with a bid: rejection as nonresponsive. See Cecile Industries, Inc., supra.

Since the invitation in this case included specifications that described the windows in great detail, and since the agency admits that the requirement had been waived in the previous two procurements, we question whether the test data in fact are needed to determine whether the offered items conformed to the invitation's specifications. In any event, the invitation failed to contain the statements necessary to place bidders on notice that the test data requirement was a matter of responsiveness. Under these circumstances, we think the testing requirement could have been reasonably viewed as relating to bidder responsibility, which may be satisfied on the basis of information submitted after bid opening, even though the solicitation appeared to require it with the bid.

We are not recommending any corrective action because we understand that the Army has already placed orders for its anticipated needs under the current contract, has

received substantial deliveries, and has incurred liability in almost the full contract amount. We are recommending, however, that if the agency requires the testing results with the bids in future procurements as a matter of bid responsiveness, the agency ensure that the solicitation advises bidders of the purpose for which the data is being requested and the consequences of failing to submit it with their bids.

Since we sustain the protest on another ground, it is not necessary for us to discuss the protester's suggestion that the Army should have waived the testing requirement solely because it had done so in the past. We point out, however, that the fact an agency waived a material requirement in a prior procurement does not affect the rejection of a bid as nonresponsive for the failure to meet the same requirement in a current procurement. Pioneer Industrial Products, B-209131, March 22, 1983, 83-1 CPD 286. The responsiveness of a bid must be determined from the bid itself and from information submitted with the bid as of the time of bid opening. Prior erroneous action by contracting officials cannot estop an agency from rejecting a bid as nonresponsive. Norris Paint & Varnish Co., Inc., B-206079, May 25, 1982, 82-1 CPD 425.

The protest is sustained.

for *Harry R. Van Cleave*
Comptroller General
of the United States